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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CROWDSOURCING, LLC

Plaintiff,

v.

COMMUNITYLEADER, INC.

Defendant.

Case No.: CV-14-3098 YGR

**NOTICE OF MOTION AND PARTIAL
MOTION TO DISMISS COUNTER-
PLAINTIFF'S COUNTERCLAIM;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: Tuesday, November 18, 2014

Time: 2:00 p.m.

Judge: Hon. Yvonne Gonzalez Rogers

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on Tuesday, November 18, 2014, at 2:00 p.m. before the Honorable Yvonne Gonzalez Rogers in Courtroom 1 – 4th Floor of the United States District Court for the Northern District of California, Oakland Division, located at 1301 Clay St., Oakland, CA 94612, Plaintiff/Counter-Defendant Crowdsourcing, LLC will and hereby does move to dismiss Defendant/Counter-Plaintiff's Counterclaim.

Plaintiff/Counter-Defendant Crowdsourcing, LLC, pursuant to Fed. R. Civ. Pro. 12(b)(6), requests this Court dismiss Defendant/Counter-Plaintiff's Counterclaim. Plaintiff/Counter-Defendant Crowdsourcing, LLC motion is based on Defendant/Counter-Plaintiff's failure to state plausible claims for trademark infringement, false designation of origin, unfair trade practices, injunctive relief, intentional interference with contract, negligent interference with contract, deceit, and malicious prosecution, the accompanying Memorandum of Points and Authorities, and all other papers filed in this action.

ISSUES TO BE DECIDED

I. As to CommunityLeader's "Trademark Claims"

- a. Whether CommunityLeader stated a plausible claim of relief for trademark infringement, false designation of origin, unfair trade practices, and injunctive relief, where its allegations show Crowdsourcing truthfully asserting that CommunityLeader is a participant in the CAPS program?
- b. Has Crowdsourcing established the three elements of nominative fair use: 1) that the product or service in question must be one not readily identifiable without the use of the trademark; 2) only a reasonably necessary portion of the mark was used to identify the product or service, and 3) Crowdsourcing did nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by CommunityLeader?

c. Has CommunityLeader alleged a use beyond nominative fair use?

II. **As to CommunityLeader's claim for intentional interference with contract, has CommunityLeader plead facts plausible to support the elements of the claim, including:**

a. Whether Crowdsourcing intentionally acted to breach a contractual relationship between CommunityLeader and a third party?

b. Whether CommunityLeader had the right to sublicense the ACCREDITED CROWDFUNDING PLATFORM mark to third parties?

c. Whether CommunityLeader alleged an actual breach or disruption of a contractual relationship?

III. **As to CommunityLeader's claim for negligent interference with contract:**

a. Whether the State of California recognizes a claim for negligent interference with contract?

b. If so, whether CommunityLeader has alleged a legally recognizable duty?

c. Does the economic loss doctrine bar CommunityLeader's claim sounding in negligence?

IV. **As to CommunityLeader's claim for deceit:**

a. Whether CommunityLeader has alleged a legally recognizable duty?

b. Does the economic loss doctrine bar CommunityLeader's claim sounding in negligence?

V. **As to CommunityLeader's claim for malicious prosecution:**

a. Whether CommunityLeader alleged Crowdsourcing commenced a prior legal action that was pursued to a legal termination in CommunityLeader's favor?

b. Whether CommunityLeader alleged that prior action was brought without probable cause?

c. Whether CommunityLeader alleged that prior action was initiated with malice?

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INTRODUCTION

Crowdsourcing, LLC (“Crowdsourcing”) is a limited liability company organized under the laws of the State of California with its principal place of business in Los Angeles County, City of Los Angeles, California. CommunityLeader, Inc. (“CommunityLeader”) is a corporation organized under the laws of the State of Nevada with its principal place of business in San Mateo County, City of San Mateo, California. Crowdsourcing is a research, advisory, and implementation firm specializing in crowdsourcing and crowd funding solutions for

1 private, public, and social enterprises. Crowdsourcing provides consulting and advisory
2 services to some of the world's leading crowd funding and crowdsourcing service providers,
3 enterprises, and governments. CommunityLeader is a software and service provider for
4 broker/dealers and other organizations that desires to link fundraisers with investors.
5 Specifically, CommunityLeader provides crowd funding software platforms that facilitate
6 securities-based crowd funding offerings.

7 Crowdsourcing has established a certification program to evaluate crowd funding
8 software platforms and websites to ensure that crowd funding software platforms meet
9 Crowdsourcing's standards of transparency, security, functionality, and operational procedure.
10 This certification program, called The Crowdfunding Accreditation for Platform Standards
11 ("CAPS") is administered by Crowdsourcing to evaluate applicants for adherence to
12 Crowdsourcing's standards and Crowdsourcing reviews applications for compliance with
13 CAPS standards and accordingly provides CAPS certification to successful applicants.
14 Crowdsourcing established a council of leading crowd funding platform operators and industry
15 experts to set CAPS program's standards.

16 If an applicant meets Crowdsourcing's standards and pays the applicable accreditation
17 fee, Crowdsourcing provides the successful applicant with a yearly license to display its
18 Accredited Crowdfunding Platform certification trademark to convey to others that it has met
19 the requirements of the CAPS program. Crowdsourcing has utilized its ACCREDITED
20 CROWDFUNDING PLATFORM CERTIFICATION trademark in association with its CAPS
21 program since as early as March 28, 2012. Crowdsourcing applied for and was granted
22 registration of its ACCREDITED CROWDFUNDING PLATFORM mark on May 7, 2013
23 (USPTO Reg. No. 4332789). See Dkt. # 1-1. As owner and administrator of the
24 ACCREDITED CROWDFUNDING PLATFORM certification mark, Crowdsourcing acts as a
25 representative of the users of that mark in trademark infringement actions and has a duty to
26 protect against consumer confusion in the marketplace arising out of the use or misuse of same
27

1 or similar marks.

2 On April 23, 2012, Crowdsourcing and CommunityLeader executed an agreement,
3 titled Crowdfunding Accreditation Agreement (“CAA”). See Dkt. # 1-2. Under the terms of the
4 CAA, CommunityLeader was required to score at least 85 out of 100 points on the CAPS
5 accreditation questionnaire and pay an annual accreditation fee to participate in the CAPS
6 program. CommunityLeader was also to pay an annual license fee to use and display the
7 ACCREDITED CROWDFUNDING PLATFORM certification mark to convey to third parties
8 that Crowdsourcing had certified its services. Under the terms of the CAA, and subject to its
9 payment obligations, CommunityLeader was provided with a limited, non-exclusive, non-
10 sublicensable, worldwide, and revocable license to use the ACCREDITED
11 CROWDFUNDING PLATFORM mark to demonstrate that CommunityLeader’s goods or
12 services and operational procedures meet CAPS program standards. See Dkt. #1-2. Under the
13 terms of the agreement, CommunityLeader was expressly prohibited “from using the
14 Certification Mark on services that do not comply with Crowdsourcing’s Accreditation
15 Standards.”

16 To ensure that consumers, who visit third party websites of participants in the CAPS
17 program, can be certain that third party websites are, in fact, certified under the CAPS
18 program, Crowdsourcing maintains a list of certified third parties on its website at
19 <http://www.crowdsourcing.org/caps>. In its Counterclaim, CommunityLeader asserts, in its
20 claims for trademark infringement, false designation of origin, unfair trade practices, and
21 injunctive relief, that Crowdsourcing should be held liable for listing CommunityLeader as a
22 participant in its CAPS program on Crowdsourcing’s website. In its Motion to Dismiss,
23 Crowdsourcing asserts that CommunityLeader’s claims for trademark infringement, false
24 designation of origin, unfair trade practices, and injunctive relief are wholly barred by the
25 doctrine of nominative fair use, a question of law. Further, Crowdsourcing asserts that
26 CommunityLeader has failed to plead viable causes of action for intentional interference with
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1 contract, negligent interference with contract, deceit, and malicious prosecution. For these
 2 reasons, CommunityLeader's counterclaims for trademark infringement, false designation of
 3 origin, unfair trade practices, injunctive relief, intentional interference with contract, negligent
 4 interference with contract, deceit, and malicious prosecution must be dismissed.

5 **LEGAL STANDARD**

6 Pursuant to Fed. R. Civ. P. 12(b)(6), a claim may be dismissed by motion for failure to
 7 state a claim upon which relief can be granted. Rule 12(b)(6) must be read in conjunction with
 8 Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is
 9 entitled to relief." Fed. R. Civ. P. 8(a). "Dismissal is appropriate when it is clear that no relief
 10 could be granted under any set of facts that could be proven consistent with the allegations set
 11 forth in the complaint." *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 560 (C.D.
 12 Cal. 2005). Though the court must view all allegations in the complaint in the light most
 13 favorable to the non-movant and must accept all material allegations and reasonable inferences
 14 to be drawn from them as true, "a court need not accept as true unreasonable inferences or
 15 conclusory legal allegations." *Id* at 561.

16 **ARGUMENT**

17 **I. CommunityLeader's claims for trademark infringement, false designation of** 18 **origin, unfair trade practices, and injunctive relief must be dismissed because** 19 **they are barred by the doctrine of nominative fair use.**

20 CommunityLeader has failed to state a claim for trademark infringement, false
 21 designation of origin, unfair trade practices, and injunctive relief ("Trademark Claims")
 22 because CommunityLeader's claims are barred by the doctrine of nominative fair use.
 23 CommunityLeader's Trademark claims hinge on the allegation, asserted with respect to all of
 24 the Trademark Claims, that "CS continues to post CLI MARK and CLI's name on CS's
 25 website as 'CAPS' accredited software which bolsters CS's services by its purported
 26 association with CLI." See Dkt. #19, ¶¶ 25, 31, 39, and 43. In short, CommunityLeader alleges
 27 that Crowdsourcing should be held liable under the Trademark Claims for truthfully asserting

1 that CommunityLeader is a participant in the CAPS program. Since the law protects
2 Crowdsourcing's actions, CommunityLeader's Trademark Claims must be dismissed.

3 The "nominative fair use analysis is appropriate where a defendant has used the
4 plaintiff's mark to describe the plaintiff's product, *even if the defendant's ultimate goal is to*
5 *describe his own product.*" *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002).
6 This analysis replaces the standard likelihood of consumer confusion analysis applicable in
7 trademark cases. *See Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002). To
8 establish nominative fair use, a defendant must prove three elements: (1) that the product or
9 service in question must be one not readily identifiable without the use of the trademark; (2)
10 only so much of the mark may be used as is reasonably necessary to identify the product or
11 service; and (3) the user must do nothing that would, in conjunction with the mark, suggest
12 sponsorship or endorsement by the trademark holder. *See New Kids on the Block v. News Am.*
13 *Pub., Inc.*, 971 F.2d 302, 308 (9th Cir. 1992). Nominative fair use is a question of law and,
14 therefore, "if the pleadings fail to allege a mark used beyond nominative fair use, then the
15 plaintiff has failed to allege likelihood of confusion. That is, the plaintiff has failed to state a
16 claim for which relief can be granted." *Stevo Design, Inc. v. SBR Marketing, Ltd.*, 919 F. Supp.
17 2d 1112, 1123-24 (D. Nev. 2013).

18 CommunityLeader has alleged that Crowdsourcing used the COMMUNITYLEADER
19 mark to state, on its website, that CommunityLeader was a participant in the CAPS program.
20 Specifically, Plaintiff has alleged that "CS continues to post CLI MARK and CLI's name on
21 CS's website as "CAPS" accredited software," "Plaintiff CS has profited from this false
22 designation of origin by conveying to customers that CLI is a participant in CS's CAPS
23 program and that CS has accredited CLI's software by publishing CLI MARK on CS website,"
24 and "Plaintiff CS continues to list CLI on CS's website as an 'accredited platform' while also
25 suing CLI for designating itself as such." See Dkt. #19, ¶¶ 25, 31, and 38. In short,
26 CommunityLeader alleges that Crowdsourcing's upholding of its end of the CAA by listing
27

1 CommunityLeader as an accredited platform, despite CommunityLeader’s failure to pay in full
2 and its sublicensing of the ACCREDITED CROWDFUNDING PLATFORM mark to third
3 parties in direct violation of the CAA, constitutes trademark infringement and associated
4 claims.

5 CommunityLeader’s alleged COMMUNITYLEADER mark was displayed by
6 Crowdsourcing, along with numerous other platforms accredited under the CAPS program,
7 under two headers: (1) “We congratulate the following platforms on receiving their ribbon of
8 accreditation!” and (2) “Platforms.” Crowdsourcing cannot, without using the name of
9 CommunityLeader and the alleged COMMUNITYLEADER mark, truthfully convey to the
10 public that CommunityLeader is a participant in the CAPS program. CommunityLeader has
11 failed to allege that Crowdsourcing used more of the mark than is reasonably necessary to
12 identify that CommunityLeader is a participant in the CAPS program. And, as stated above,
13 CommunityLeader has failed to allege that Crowdsourcing did anything to suggest that it is
14 sponsored or endorsed by CommunityLeader. The headers on Crowdsourcing’s website, which
15 identify participants in the CAPS program, make clear that Crowdsourcing has not undertaken
16 any action to convey that it is sponsored or endorsed by CommunityLeader.

17 This case is similar to *Stevo Design, Inc. v. SBR Marketing, Ltd.* In *Stevo*, Stevo sold
18 electronic access to sports betting reports. SBR operated a website, which published sports
19 betting and handicapping information. Stevo filed suit against SBR, alleging claims of
20 trademark infringement and copyright infringement, because, Stevo alleged, SBR’s users had
21 published Stevo’s protected works on SBR’s website without having obtained a license. In
22 examining SBR’s nominative fair use defense, the District of Nevada recognized that the
23 doctrine of nominative fair use “divides trademark ‘use’ from trademark ‘mention.’” *Stevo* at
24 1123. “To use a mark as a mark—a ‘trademark use’—the defendant must attempt to identify
25 the source of the mark with the defendant itself.” In examining whether SBR attempted to
26 identify itself with Stevo, the Court held,

1 Here, Plaintiffs have failed to allege anything beyond SBR's nominative fair use
2 of their marks. First, the marks at issue are the proper names of the
3 handicapping analysts. It would be difficult (if not impossible) to identify
4 Stevo's sports analysis services without using these marks, especially since the
5 quality of the analyst bears directly on the quality of the analysis (and
6 conveying information about quality is one of a trademark's functions). Second,
7 as alleged in the complaint, when the marks appeared on SBR's website, they
8 only identified Stevo's services. For example, one SBR user identified as "Pin
9 Fish" posted handicapping reports under the subject line "redd, Jordan, davis,
10 nover, o'brien, mancini???" (citation omitted). The subject line identifies
11 Plaintiffs' analysts Redd, Jordan, Davis, Nover, O'Brien, and Mancini, and the
12 body of the posting contained these analysts' reports. Third, the criticism of
13 Stevo's analysts on the message board greatly reduces the likelihood that a
14 visitor to SBR's message board would infer Plaintiffs' "sponsorship or
15 endorsement" of SBR users' postings. Finally, the various screen names under
16 which Stevos' reports were posted—"Pin Fish," "PepperMillRick,"
17 "goldengreek," etc.—do not suggest to a visitor that either the posting user or
18 SBR itself is the ultimate source of the report.

19 *Stevo* at 1124.

20 As stated above, it would be impossible to identify CommunityLeader's services
21 without using the alleged COMMUNITYLEADER mark. As alleged by CommunityLeader in
22 its Counterclaim, the mark was used to identify CommunityLeader's services and its
23 participation in the CAPS program, not Crowdsourcing's services. And the manner in which
24 the alleged COMMUNITYLEADER mark was displayed on Crowdsourcing's website makes
25 clear that CommunityLeader was a participant in the CAPS program. For these reasons,
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CommunityLeader's Trademark Claims must be dismissed as a matter of law.

II. CommunityLeader's claim for intentional interference with contract must be dismissed because CommunityLeader has failed to allege actual disruption or breach of a contractual relationship or awareness of a potential inference on the part of Crowdsourcing.

CommunityLeader's claim for intentional interference with contract must also be dismissed for its failure to allege an actual disruption or breach of a contractual relationship or that Crowdsourcing was aware that its actions would cause interference with CommunityLeader's purported contracts. For its Count V, CommunityLeader alleges "intentional interference with economic relationship." Since CommunityLeader has not alleged interference with a prospective business relationship, and because it asserts that "Plaintiff CS knew of the contracts and relationships that existed between Defendant CLI and... third parties..." Crowdsourcing interprets CommunityLeader's allegations as a claim for intentional interference with contract. See Dkt. #19 ¶ 47.

To establish a claim for intentional interference with contract, CommunityLeader must allege and prove the following elements: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. See *Pacific Gas and Electric Co. v. Bear Stearns and Co. et al.*, 50 Cal. 3d 1118, 1126 (1990). CommunityLeader has alleged that it has entered into contracts with non-specified third parties "in order to sell, service, or host white-label websites...." See Dkt. # 19 ¶ 46. CommunityLeader has failed, however, to allege that Crowdsourcing intentionally acted to breach or disrupt CommunityLeader's relationships with

1 third parties. CommunityLeader asserts that Crowdsourcing “failed to perform, make
2 payments, and provide acknowledgement to CLI to use CS MARK in relation to such third
3 party from-end (sic) websites despite receiving commission on many of them.” In short,
4 CommunityLeader alleges that Crowdsourcing’s enforcement of its trademark rights in and to
5 the ACCREDITED CROWDFUNDING PLATFORM mark through this lawsuit serves as the
6 basis for CommunityLeader’s intentional interference with contract claim.
7

8 But Crowdsourcing’s enforcement of its trademark rights are neither wrongful nor a
9 justification for an intentional interference with contract cause of action. Crowdsourcing has
10 alleged, and the terms of the CAA support, that CommunityLeader was expressly prohibited
11 from sublicensing the ACCREDITED CROWDFUNDING PLATFORM mark to third parties.
12 See Dkt. # 1-2 (“Crowdsourcing grants to Applicant a... non-sublicensable... license to use the
13 Certification Mark on or in connection with Applicant’s crowdfunding services that meet the
14 Accreditation Standards.”); see also Dkt. #1 ¶ 38 (“Under the CAA, Defendant
15 CommunityLeader is expressly prohibited from assigning, licensing, or sublicensing the
16 ACCREDITED CROWDFUNDING PLATFORM mark to its clients that license its
17 software.”). And CommunityLeader has also failed to plead that Crowdsourcing knew that its
18 enforcement of its trademark rights would cause some unspecified harm to third parties to
19 whom which CommunityLeader had no contractual right to sublicense the ACCREDITED
20 CROWDFUNDING PLATFORM mark. *See Quelimane Company, Inc. et al. v. Stewart Title*
21 *Guaranty Company et al.*, 77 Cal. Rptr. 2d 709 (1998) (citing Rest. 2^d Torts, § 766, com. J., at
22 p. 12) (“If the actor is not acting criminally nor with fraud or violence or other means wrongful
23 in themselves but is endeavoring to advance some interest of his own, the fact that he is aware
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1 that he will cause interference with the plaintiffs contract may be regarded as such a minor and
2 incidental consequence and so far removed from the defendant's objective that as against the
3 plaintiff the interference may be found to be not improper." CommunityLeader has simply
4 failed to allege any improper interference with a contract.

5 Nor has CommunityLeader alleged an actual breach or disruption of a contractual
6 relationship. It alleges that Crowdsourcing terminated contracts with CommunityLeader, but it
7 fails to allege that any contracts between CommunityLeader and its unspecified third parties
8 have been terminated as a result of Crowdsourcing's alleged actions. See Dkt. # 49 ¶ ("As a
9 proximate result of Plaintiff's failure to perform, pay, and permit use of CS MRK (sic) and its
10 subsequent improper termination of the contracts, Defendant suffered damages in a yet
11 unascertained amount, the extent of which will be subject to proof at trial.").

12 CommunityLeader's failure to allege a breach of a specific and identifiable contract is
13 determinative of its claim for intentional inference with contract, and, for this reason,
14 CommunityLeader has failed to state a claim upon which relief can be granted.

15 **III. CommunityLeader has failed to allege a viable claim for negligent interference**
16 **with contract because that cause of action is not available under California law.**

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20 As with its claim for intentional interference with contract, CommunityLeader broadly
21 asserts that Crowdsourcing should be held liable for a claim of "negligent interference with
22 economic relationship." In support of this alleged cause of action, CommunityLeader asserts
23 that "Plaintiff was informed that Defendant would be required to enter into aforementioned
24 contracts with third parties" and that "[i]n spite of the foreseeability of harm to Defendant's
25 economic relationships, Plaintiff failed to perform, make payments, and provide
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27
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acknowledgement to CLI to use CS MARK in relation to such third party front-end websites.”

See Dkt. #19 ¶¶ 53, 54. Again, CommunityLeader asserts that Crowdsourcing has interfered with its contractual relationships with third parties, not a prospective business relationship, so Crowdsourcing has understood CommunityLeader’s claim as one for negligent interference with contract¹.

California, however, expressly does not recognize a cause of action for negligent interference with contract. Specifically, the California Court of Appeals, in *Limandri v. Judkins*, examined this claim:

For the same reason, the complaint also fails to state a cause of action for negligent interference with contractual relations (as opposed to prospective economic advantage. In *Fifeld Manor v. Finston* (1960) 54 Cal.2d 632 [7 Cal. Rptr. 377, 354 P.2d 1073, 78 A.L.R. 2d 810], the California Supreme Court noted: “[W]ith the exception of an action by the master for tortious injuries to his servant, thus depriving the master of his servant’s services, which traces back to medieval English law [citations], the courts have consistently refused to recognize a cause of action based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract between third parties or renders its performance more expensive or burdensome. [Citations.]”

Limandri v. Judkins, 52 Cal. App. 4th 326, 349 (1997). Even if California recognized this

¹ It is worth noting that, even if CommunityLeader’s claim was read as one for negligent interference with prospective business economic advantage, CommunityLeader has failed to plead that Crowdsourcing owed CommunityLeader a duty to care that was breached when Crowdsourcing filed this lawsuit for infringement of its trademark rights.

claim, CommunityLeader has failed to allege that Crowdsourcing has or had breached a legally recognizable duty. Additionally, even if CommunityLeader had pled a duty, the only inference that can be drawn from its allegations is that its alleged losses are economic in nature stemming from a breach of contract. See Dkt. #19 ¶ 55 (“Defendant suffered damages in a yet unascertained amount....”). Such an allegation, under the economic loss doctrine, sounds only in contract, not in tort. See *Robinson Helicopter Co., Inc. v. Dana Corp.*, 22 Cal. Rptr. 3d 352, 358 (2004) (“The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise”); see also *J’Aire Corp. v. Gregory*, 24 Cal. 3d 799, 808 (1979) (“Following these principles, recovery for negligent interference with prospective economic advantage will be limited to instances where the risk of harm is foreseeable and is closely connected with the defendant’s conduct, where damages are not wholly speculative and the injury is not part of the plaintiff’s ordinary business risk.”). For this reason, Crowdsourcing’s Motion to Dismiss must be granted and CommunityLeader’s claim for negligent interference with contract must be dismissed.

IV. CommunityLeader’s cause of action for deceit must be dismissed.

CommunityLeader’s cause of action for deceit must also be dismissed. Pursuant to Cal. Civ. Code § 1709, “One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” Additionally, under Cal. Civ. Code § 1710, such deceit is either:

- (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) The assertion, as a fact, of which is not true, by one who has no reasonable ground for believing it to be true;

(3) The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(4) A promise, made without any intention of performing it.

Cal. Civ. Code § 1710. One who asserts a cause of action for deceit must plead and prove actual reliance. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1092 (1993) (“[I]t is entirely consistent with those statutes that California courts have always required plaintiffs inactions for deceit to plead and prove the common law element of actual reliance”).

CommunityLeader asserts that Crowdsourcing should be held liable for deceit because Crowdsourcing “continues to withhold funds owed to [CommunityLeader] from [Crowdsourcing]” under the Consulting Services Agreement. See Dkt. #19 ¶ 57. Further, CommunityLeader alleges that it relied on Crowdsourcing’s promise to “pay the monies owed to Defendant under the CSA, and the referrals, marketing, conferences, articles, and reports under the CAA and MSA 2.” See Dkt. #19 ¶ 59. In short, CommunityLeader asserts that Crowdsourcing failed to comply with its contracts in support of its claim of deceit.

As above, CommunityLeader has failed to allege that Crowdsourcing has breached any independent duty arising under tort law. Tort damages, whether for deceit or negligent interference, are available in contract cases only where “a breach of duty directly causes physical injury; for breach of the covenant of good faith and fair dealing in insurance contracts; for wrongful discharge in violation of fundamental public policy; or where the contract was

1 fraudulently induced.” *Robinson Helicopter Co., Inc. v. Dana Corp.*, 22 Cal. Rptr. 3d 352, 359
 2 (2004). “If every negligent breach of a contract gives rise to tort damages the limitation would
 3 be meaningless, as would the statutory distinction between tort and contract remedies.” *Erlich*
 4 *v. Menezes*, 21 Cal. Rptr. 2d 886, 981 (Cal. 1999). Here, CommunityLeader has only alleged
 5 that Crowdsourcing has failed to perform under the contracts between the parties, and
 6 CommunityLeader’s bald assertion that it relied on Crowdsourcing’s promises under the
 7 contracts between the parties and suffered a loss of business reputation because Crowdsourcing
 8 did not hold conferences, even if taken as true, is insufficient to support an independent claim
 9 for deceit². Consequently, Crowdsourcing’s Motion to Dismiss must be granted.
 10

11 **V. CommunityLeader has failed to state a claim for malicious prosecution.**

12 CommunityLeader has also failed to state a claim for malicious prosecution. To
 13 establish a cause of action for malicious prosecution of either a criminal or civil proceeding,
 14 CommunityLeader must establish “that the prior action (1) was commenced by or at the
 15 direction of the defendant and was pursued to a legal termination in his, plaintiff’s favor; (2)
 16 was brought without probable cause; and (3) was initiated with malice.” *Bertero v. National*
 17 *General Corp.*, 13 Cal.3d 43, 50 (1974). A cause of action for malicious prosecution “has
 18 traditionally been regarded as a disfavored cause of action” because it has the potential to
 19 impose an “undue ‘chilling effect’ on the ordinary citizen’s willingness... to bring a civil
 20 dispute to court.” *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863, 872 (Cal. 1989).
 21

22 In support of its claim for malicious prosecution, CommunityLeader alleges: (1) that

23 ² Reading CommunityLeader’s claims in a light most favorable to it, the primary basis for CommunityLeader’s
 24 independent duty is that Crowdsourcing represented that CommunityLeader would be given a Gold Sponsorship
 25 package at all Crowdsourcing conferences and, since multiple conferences were not held, CommunityLeader
 26 suffered “loss of business reputation.” But the MSA 2 reads, “CLI will be granted a Gold Sponsorship package at all
 27 CROWDSOURCING conferences held during the Performance period.” See Dkt. #1-4 ¶ 2.4. Crowdsourcing held
 28 only one such conference, and CommunityLeader was granted a Gold Sponsorship package at that conference.
 Under the terms of the MSA 2, Crowdsourcing was under no obligation to provide a set number of conferences and,
 as a result, CommunityLeader, accepting its allegations as true, is limited to economic damages and has failed to
 state a breach of an independent duty outside of contract law.

1 “Plaintiff has no basis for arguing a breach of contract claim since Defendant paid everything
 2 owed under all contracts;” (2) that “MSA 1 was superseded and replaced by MSA 2;” (3) that
 3 Crowdsourcing’s counsel failed to contact CommunityLeader prior to filing the lawsuit; and
 4 (4) that Crowdsourcing’s counsel refused to agree to a stipulation to extend the time to respond
 5 to the Complaint. See Dkt. 19 ¶¶ 102, 103, and 104. Since CommunityLeader has failed to
 6 meet the elements of a malicious prosecution action, this claim must be dismissed as a matter
 7 of law.

8 First, CommunityLeader has failed to allege that a prior lawsuit was commenced by or
 9 at the direction of Crowdsourcing and was pursued to a legal termination in favor of
 10 CommunityLeader. This alone should serve as a basis to dismiss CommunityLeader’s claim.
 11 CommunityLeader contends, under *Zamos v. Stroud*, that continuing to pursue a lawsuit
 12 lacking probable cause also serves as a basis for a malicious prosecution claim. In *Zamos*, the
 13 defendants in the malicious prosecution action continued their prosecution of an underlying
 14 fraud action even after learning it was baseless. See *Zamos v. Stroud*, 12 Cal. Rptr. 3d 54, 62-
 15 63 (Cal. 2004). Here, however, no such determination has been made, and it cannot reasonably
 16 be said that Crowdsourcing’s claims are without merit.

17 Crowdsourcing has alleged, and CommunityLeader has admitted in evidence to be
 18 presented at trial, that it owes Crowdsourcing affiliate payments³. Additionally, contrary to
 19 CommunityLeader’s assertions, CommunityLeader is still under an obligation to pay affiliate
 20 fees under MSA 1. See Dkt. 1-3 ¶ 6.4 (“CLI agrees to pay... a one-time payment... as
 21 settlement on all previous agreements accept the (sic) as it relates to the ongoing incentive fee
 22 for CROWDSOURCING accounts secured prior to the Performance Period⁴....”).
 23 Crowdsourcing has alleged and presented evidence attesting to the merit of, viability of, and
 24 probable cause associated with its claims. And CommunityLeader has failed to allege that

25
 26 ³ On July 17, 2014, George Stroebel, Chief Financial Officer of CommunityLeader, emailed Carl Esposti, CEO of
 Crowdsourcing, stating, “we concede some incentive payments are due to Crowdsourcing.”

27 ⁴ Under MSA 2, accounts “secured prior to the Performance Period” were secured under the terms of MSA 1.

1 Crowdsourcing has filed or continued to prosecute its claims with malice. Therefore,
2 CommunityLeader cannot maintain a cause of action for malicious prosecution, as it has failed
3 to allege a claim that is plausible on its face.

4 Finally, CommunityLeader has alleged in support of its claim for malicious prosecution
5 that Crowdsourcing's counsel failed to contact CommunityLeader prior to filing its lawsuit and
6 would not agree to a stipulation to extend the time to respond to the Complaint. Since
7 CommunityLeader has failed to allege that a prior lawsuit has been terminated in its favor, its
8 allegations must again be read as asserting a malicious prosecution claim on the basis that
9 Crowdsourcing continues to prosecute a lawsuit without probable cause. CommunityLeader's
10 claims in this respect are asserted against a non-party, namely, Crowdsourcing's counsel.
11 Regardless, Crowdsourcing, and any plaintiff wrongfully aggrieved, has the right to seek
12 judicial assistance without notice when its rights have been violated, as occurred in this case.
13 See, for example, Fed. R. Civ. P. 65, which provides for ex parte temporary restraining orders.
14 Further, a plaintiff also has the right to decline to waive its rights, and to require compliance
15 with the timelines specified under the Federal Rules of Civil Procedure for responding to
16 complaints. CommunityLeader's allegations fail to rise to the level of a malicious prosecution
17 claim, and CommunityLeader has failed to state a claim for malicious prosecution that is
18 plausible on its face.

19 20 CONCLUSION

21 For the reasons stated, Plaintiff/Counter-Defendant Crowdsourcing, LLC respectfully
22 requests this Honorable Court grants its Partial Motion to Dismiss.

1 Date: September 26, 2014

By: ___/JAD/_____

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2014 a true and correct copy of Plaintiff's Brief in Support of Partial Motion to Dismiss Counter-Plaintiff's Counterclaim was served on Counter-Plaintiff via the ECF electronic filing system.

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